

PRE-APPEAL BRIEF REQUEST FOR REVIEW

Docket Number (Optional)

20835D1

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on _____

Signature _____

Typed or printed name _____

Application Number

10/801405

Filed

March 16, 2004

First Named Inventor

Senn, et al.

Art Unit

1616

Examiner

Alton Pryor

Applicant requests review of the final rejection in the above-identified application. No amendments are being filed with this request.

This request is being filed with a notice of appeal.

The review is requested for the reason(s) stated on the attached sheet(s).

Note: No more than five (5) pages may be provided.

I am the

☐ applicant/inventor.

/JAMES CUEVA/

Signature

☐ assignee of record of the entire interest.

James Cueva

See 37 CFR 3.71. Statement under 37 CFR 3.73(b) is enclosed.
(Form PTO/SB/96)

Typed or printed name

☒ attorney or agent of record.

Registration number 58558

336-632-6757

Telephone number

☐ attorney or agent acting under 37 CFR 1.34.

Registration number if acting under 37 CFR 1.34 _____

June 8, 2010

Date

NOTE: Signatures of all the inventors or assignees of record of the entire interest or their representative(s) are required.

Submit multiple forms if more than one signature is required, see below.

☐ *Total of _____ forms are submitted.

This collection of information is required by 35 U.S.C. 132. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.11, 1.14 and 41.6. This collection is estimated to take 12 minutes to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Mail Stop AF, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

IN RE APPLICATION OF

Art Unit: 1616

SENN ET AL.

Examiner: PRYOR, Alton

APPLICATION NO: 10/801,405

Confirmation No. 5092

FILED: March 16, 2004

FOR: PESTICIDAL COMPOSITIONS

Mail Stop Amendment
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

PRE APPEAL BRIEF REQUEST FOR REVIEW

Applicants request review of the final rejection in the above-identified application. No amendments are being filed with this Request. A three month extension of time is filed herewith.

This Request is being filed with a Notice of Appeal and the appeal fee.

The Review is being requested for the reasons stated on the sheets attached hereto.

Applicants do not believe any additional fees are due with this request. If additional fees are due, please charge the required fees to Deposit Account No. 50-1676 in the name of Syngenta Crop Protection, Inc.

Status/Summary of Claims

Claims 17, 18, 20, 24, 31 and 33-43 are pending in the application.

Claim 33, 37 and 42 are directed to compositions for controlling insects

Claims 17, 18, 31, 34, 35, 36, 38, 39, 40, 41 and 43 are directed to methods for controlling insect.

Claims 20 and 24 is directed to plant propagation material treated with the composition of claim 33.

Claims 17, 18, 20, 24, 31 and 33-43 are rejected under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent 5,852,012 to Mainfisch et al. ("Mainfisch") and the The Agrochemical Handbook.

Rejection under 35 U.S.C. § 103(a)

Claims 17, 18, 20, 23, 24, 31 and 33-43 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Mainfisch and The Agrochemical Handbook.

The Examiner states that Mainfisch teaches: an insecticidal compound comprising thiamethoxam, compositions comprising thiamethoxam and optionally other actives, and methods of controlling insects comprising applying the compounds to the pests, crop, seed, foliage and soil. The Examiner acknowledges that Mainfisch fails to teach the composition or method comprising abamectin. However, the Examiner states that the Agrochemical Handbook teaches abamectin as an insecticide, and argues that it would have been obvious to one of ordinary skill in the art to modify Mainfisch to include the abamectin taught by the Agrochemical handbook. The Examiner argues that one of ordinary skill in the art would have been motivated to do so since each reference has the same utility, it would be automatic that Mainfisch's modified method would control insects.

Examiner has failed to establish a *prima facie* case of Obviousness

Applicants respectfully submit the Examiner has failed to establish a prima facie case of obviousness. Applicants respectfully submit that the Examiner has failed to show that the references teach or suggest all the claim limitations. Notably, the Examiner has not cited any

reference or provided any rationale for the limitation of claim 33 “wherein the weight ratio of thiamethoxam to abamectin is from 10:1 to 1:1.” As such, Applicants submit the examiner has failed to establish a *prima facie* case of obviousness.

Data Presented provides for Unexpected Results

Applicants respectfully traverse the Examiner’s rejection. Applicants respectfully submit that the data presented in the declaration of Elke Hillesheim provides the requisite evidence to rebut the Examiner’s *prima facie* case of obviousness. Applicants respectfully submit that the comparative data, taken as whole found in Tables 2a, 2b, and 2c (corrected) provides substantial evidence of unexpectedness for claims 17, 18, 20, 24, 31 and 33-41.

The Examiner has responded to the Applicant’s argument that the declarations filed contained mixed results in tables 2a, 2b, 2c, 2d and 2e for a combination of abamectin and thiamethoxam.

Applicants had amended claims 17, 20, 33 and 36 to recite “insects” Applicants note that that the species *Tetranychus urticae*, which data is provided for in Tables 2d and 2e is not an insect. Accordingly, Applicants submit that the data presented in Table 2d and 2e is not relevant to claim 33 and claims dependent thereon.

Claims 42 & 43

In the previous amendment filed by Applicants, Applicants added new claims 42 & 43 which respectively recite “A composition for controlling pests comprising a synergistically effect amount of thiamethoxam and abamectin” and “A method of controlling pests comprising applying a synergistically effect amount of thiamethoxam and abamectin, to the pests or to plants, plant propagation material, site where the propagation material is brought out, or soil.”

In light of the arguments set forth above, Applicants respectfully request reconsideration and allowance of all of the pending claims.

The Commissioner is hereby authorized to charge any additional fees under 37 CFR §1.17 which may be required, or credit any overpayment, to Account No. 50-1676 in the name of Syngenta Crop Protection, Inc.

Respectfully submitted,

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